APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 9227, 9287, 9289, 9308, 9310, 9311, 9315, 9316, 9317, 9318, and 9319

March Term, 1967

SUNRAY DX OIL COMPANY, ET AL., *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

[Filed: United States Court of Appeals, Tenth Circuit, May 18, 1967, William L. Whittaker, Clerk.]

On Rehearing

[May 18, 1967]

PER CURIAM.

The petitioners in Nos. 9227, 9287, 9308, 9310, 9311, 9315, 9316, 9317, 9318, and 9319 and the intervenors Texaco Inc., Sunray DX Oil Company, Humble Oil & Refining Company, Lamar Hunt, Sohio Petroleum Company and Sun Oil Company in No. 9289 have filed petitions for rehearing asking that the judgments of reversal and remand entered on March 27, 1967, be vacated and that all the cases be held in abeyance pending Supreme Court review of No. 7781, Sunray DX Oil Company, et al. v. Federal Power Commission.

These cases all seek review of Federal Power Commission Opinions Nos. 501 and 501-A ordering refunds of

amounts collected under unconditioned temporary certificates in excess of the price established in Opinion No. 422. We reversed and remanded all the cases by an opinion filed in No. 9289, Standard Oil Company of Texas v. Federal Power Commission, —— F. 2d ——, and by orders entered in the other cases in accordance with that opinion. This action was taken because we had previously held that the Commission did not have the power to order such refunds.

These cases all concern (1) the power of the Federal Power Commission to order the refunds and (2) the manner of the exercise of that power. The Commission represented to us that the issue of power was severable from the issue of the exercise of the power and urged us to make summary disposition of the power issue because the same question was decided by our opinion in No. 7781, Sunray DX Oil Company v. Federal Power Commission, 10 Cir., 370 F.2d 181, which is now pending in the United States Supreme Court on the Commission's petition for certiorari. In the belief that prompt disposition of these cases would be proper and might aid in the resolution of the question by the United States Supreme Court because these cases present no jurisdictional problem although the Sunray DX case now pending on application for certiorari has jurisdictional questions raised by the Commission, we disposed of all of them by an opinion rendered in No. 9289, Standard Oil Company of Texas v. Federal Power Commission, and by appropriate orders entered in the other cases on the authority of that opinion. In so doing we expressly stated that we made no decision on the propriety and validity of the exercise of the power.

The petitions for rehearing assert that the Commission in its application for certiorari in our No. 9289 said that in the event certiorari was granted it reserves "the right to argue additionally that the Commission reasonably exercised its power in directing the refunds which it ordered in these proceedings." This action is said to be a change

of position which deprives the petitioners of their right to be heard in this court on the exercise of the power. The ambivalence of the Commission is something beyond our control. We adhere to our view that we are not concerned with the exercise of a nonexistent power. If it should be held on Supreme Court review that we are wrong in our decision as to the existence of the power, we are ready to consider then the manner of the exercise of the power.

The petitions for rehearing and for stay of mandate are severally denied.